APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED NOVEMBER 14, 2000

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-1082

J.B. PINER; JUDY BROWN; STEPHEN C. BYRD; WILLIAM CLEMMONS; THOMAS E. GRADY; NORMAN HORNE; STEVENS MCLEAN; JEFFERY L. STEALER; C.D. STOKES; JAMES H. WEBB; LARRY WHITLEY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS & COMPANY; THE BOARD OF BENEFITS AND PENSIONS OF E.I. DUPONT DE NEMOURS; DUPONT PENSION AND RETIREMENT PLAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
James C. Fox, District Judge.
(CA-99-48-7-F)

Argued: September 25, 2000

Decided: November 14, 2000

Appendix A

Before WIDENER and LUTTIG, Circuit Judges, and Jackson L. KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

* * *

OPINION

PER CURIAM:

Piner, et al., ("appellants") sued their employer, E.I. DuPont De Nemours and Company ("DuPont"), for alleged violations of the Federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, on claims related to DuPont's implementation of an enhanced benefits plan, the Voluntary Separation Program Prime ("VSP Prime"), in which appellants were not selected to participate. The district court granted summary judgment for DuPont. For the reasons that follow, we affirm.

I.

Appellants are employees and former employees of DuPont's Cape Fear facility in Leland, North Carolina. All appellants are participants in DuPont's tax- qualified pension plan, the Pension and Retirement Plan ("P&RP"), which provides pension and other benefits, including retiree health benefits, for eligible employees. These participants are entitled to a pension benefit calculated in accordance with defined formulas based on length of service, age at retirement, and average monthly pay.

Appendix A

DuPont began downsizing its workforce and, in order to encourage early retirements and separations, the company implemented — within the P&RP — several incentive voluntary separation programs ("VSPs"). The purpose of these VSPs was to reduce positions at the Cape Fear site by encouraging employees to separate or retire early. The VSPs were implemented by plan amendments to the P&RP and were part of, and funded by, the P&RP Trust. Any qualified employee "who voluntarily elect[ed] to retire or separate under the incentive program provided" by the VSPs contained within the P&RP received enhanced severance benefits (if not entitled to early retirement benefits), or, for "qualified employees who meet the age and service requirements for an Optional Retirement," enhanced pension benefits. J.A. 191-92.

While ERISA itself does not include non-discrimination rules, the VSP benefits were required to comply with the complex non-discrimination rules applicable under section 401(a)(4) of the Internal Revenue Code because the P&RP is a tax-qualified retirement plan. As such, VSP benefits were limited to a non-discriminatory group of employees. Consequently, DuPont could not utilize the VSPs within the P&RP to encourage the separation or early retirement of all employees it wished to separate voluntarily.

In order to provide enhanced benefits that could not be offered under the P&RP or its VSPs, DuPont created "VSP Prime," offered at "management discretion," J.A. 110, 113, for "designated employees," J.A. 110; *see also* J.A. 118 (summary plan description). Unlike the original VSPs, VSP Prime did not involve a plan amendment to the P&RP and

was not part of the P&RP. Rather, VSP Prime was an entirely separate plan, intended for application in those instances where use of the regular VSPs was "inappropriate/ impossible," but where DuPont nonetheless wanted to further downsize its workforce to eliminate excess employees. J.A. 111. Employees selected to participate in VSP Prime also remained participants in the P&RP, and retained the defined pension benefits they had accrued under the P&RP.

After appellants were not selected to participate in VSP Prime, they filed suit complaining that the "benefits and features of 'VSP Prime' were not made known or available to all Cape Fear employees," Appellants' Br. at 8, and that VSP Prime was funded by the P&RP. The district court disagreed and granted summary judgment to DuPont.

II.

Appellants argue that the district court erred in granting summary judgment to DuPont on their ERISA claims. Repeating their claims made before the district court, they contend that DuPont breached its fiduciary duty under section 404(a)(1)(D) of ERISA to administer retirement plans for the "sole and exclusive benefit of the participants and beneficiaries," by granting enhanced pensions to select upper management employees through the VSP Prime plan and by funding the VSP Prime plan with funds from the P&RP Trust. J.A. 15-18. Appellants further claim that DuPont's failure to provide VSP Prime plan documents violates the requirement under section 104(b)(4) of ERISA that an administrator "shall upon written request of any participant

or beneficiary" furnish the summary plan description and "other instruments under which the plan is established or operated."

The district court held that the claim under section 404(a)(1)(D) of ERISA did not survive summary judgment because VSP Prime was "by its terms and in fact, a separate benefit paid from general corporate assets [so that] there is no factual predicate to support the [appellants'] substantive ERISA claim." J.A. 292. Moreover, because it was undisputed that appellants are not participants in VSP Prime, the district court held that the claim for statutory penalties under section 104(b)(4) also failed because appellants lacked standing to demand documents related to VSP Prime, and because the circumstances did not warrant the imposition of statutory penalties with regard to the P&RP documents. We agree with the district court.

A.

We address first appellants' contention that the "discriminatory" availability of VSP Prime somehow constitutes a breach of ERISA. Appellants offer no authority for this argument, a fact which is hardly surprising given that ERISA nowhere requires that benefits offered to some employees must be offered to all employees or even that a pension be provided at all. Rather, ERISA requires only that an employee be provided those benefits set forth in the pension plan in which he, or she, is a participant. While appellants are participants in the P&RP, appellants were not selected to participate in VSP Prime. Accordingly, appellants have no "right" — statutory, contractual, or otherwise — to

the enhanced benefits provided by VSP Prime. Moreover, appellants fail to articulate how, if at all, the fact that some employees received enhanced benefits under VSP Prime affects the benefits to which appellants are entitled under P&RP. ERISA simply does not prohibit an employer from offering some employees and not others access to separate, additional plans with enhanced benefits. Consequently, appellants wholly fail to allege any redressable injury resulting from the selective availability of VSP Prime.

Furthermore, while appellants allege in their complaint that VSP Prime was funded by the P&RP Trust, J.A. 16, this unsupported allegation is directly contradicted both by DuPont's affidavits and by the VSP Prime documents. Appellants' claim that VSP Prime is funded by the P&RP Trust rests entirely on language in a memorandum regarding the VSP Prime incentive at J.A. 111, which states in pertinent part that "[i]ncentive is paid from operating expense and regular accrued benefit from the Pension Trust." Appellants contend that this reference to payment of accrued benefit from the Pension Trust creates a genuine issue of material fact because it is in conflict, they insist, with the affidavit of Anne M. Cole, DuPont's Manager of Benefits, which states "VSP Prime benefits were paid from DuPont's general corporate assets or operating funds." J.A. 140.

Even assuming a facial conflict between these two statements, a conflict we do not concede, the need to resolve actual conflicts and ambiguities in the light most favorable to the party opposing summary judgment does not require that we afford language a meaning divorced from relevant facts in order to *create* an ambiguity. And, as the record

makes clear, VSP Prime, by its own terms, does not provide a "regular accrued benefit," so that the only accrued benefits paid from the P&RP Trust were those required and payable under the terms of the P&RP. These accrued benefits from the P&RP are relevant to VSP Prime *only* insofar as they are used as a figure from which the VSP Prime incentive is calculated and adduced:[1] VSP Prime pays an amount that is "the actuarial equivalent of [an employee's] pension benefit determined under Section XI of the Pension and Retirement Plan, less the normal pension benefit determined under the Pension and Retirement Plan." J.A. 118.

In final clarification of the difference between the VSP incentive on the one hand, and accrued benefit under the P&RP on the other, VSP Prime provides only a lump sum payment, payable in one or two installments, as an incentive for the early separation and retirement of employees specifically invited to participate. It is not, and does not purport to be, a pension plan paying *any* "regular accrued benefit."[2]

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1. Furthermore, the VSP Prime plan summary clearly states that the lump sum payments are "not from a qualified plan" (which the P&RP is), *compare* J.A. 25 *with* J.A. 150, that VSP Prime is "in addition to any pension rights for which the employee may be eligible," J.A. 118, and that "the payment under this Program is payable from the Company's general assets, not from the P&RP Pension Trust Fund." J.A. 118-19.

2. It remains undisputed that "[t]here was no enhancement for VSP Prime participants to any benefit paid from the DuPont Pension and Retirement Plan (P&RP) Trust. VSP Prime participants remained eligible for the same benefits under the P&RP that they were eligible for without regard to VSP Prime, no more, no less." J.A. 140 (Affidavit of Anne Cole).

J.A. 118-19. Consequently, appellants' reliance on a passing reference to accrued benefits under the Pension Trust as singular evidence that the VSP Prime is funded by the Pension Trust is, at best, misplaced. We need not, and do not, consider such unsupported speculation as evidence of a controverted fact sufficient to withstand summary judgment. *See Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411-12 (4th Cir. 1986). Ergo, we agree with the judgment of the district court that there is no evidence that VSP Prime is funded by the P&RP Trust and, for the reasons stated above, we affirm the grant of summary judgment to DuPont on appellants' claim for breach of fiduciary duty under section 404(a)(1)(D) of ERISA.

B.

Appellants also contend that the district court erred in failing to award them statutory penalties under section 104(b)(4) of ERISA for DuPont's failure to provide requested documents. However, the claims under section 104(b)(4) lack at least one factor necessary for relief, and the district court clearly acted within its discretion. For, while section 104(b)(4) requires that, upon written request of a participant or beneficiary, an administrator "shall" furnish the summary plan description and "other instruments under which the plan is established or operated," section 502(c) of ERISA provides the exclusive remedy for an administrator's failure or refusal to comply with such requests. And, as provided for in section 502(a)(1)(A), a civil action may be brought "for the relief provided for in subsection (c)" *only* by a plan "participant" or "beneficiary." None of the appellants were invited to participate in VSP Prime and, consequently, they are not VSP

Appendix A

Prime participants as defined in ERISA: " '[P]articipant' means any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7) (§ 3(7) of ERISA). *See Stanton v. Gulf Oil. Co.*, 792 F.2d 432, 435 (4th Cir. 1986) (citing cases). Because appellants were never covered by VSP Prime, the district court correctly held that DuPont had no duty to provide them information about it, and appellants have no standing to file suit or claim statutory penalties with respect to it.

To the extent that appellants allege a failure to provide P&RP documents, Pier's statement that he "verbally requested a plan description, the plan document, and the IRS qualification number," J.A. 138, also fails to support a right to statutory penalties, because the request for P&RP documents was not in writing, as section 104(b)(4) requires. Moreover, the later affidavit of DuPont's Human Resources Manager, Shelby Harper, specifically stated that a copy of the P&RP documents was sent "by internal plant mail" within two weeks of an oral request by Piner, and that Piner did not inform her for two years that he had not received a copy of the P&RP documents, at which time she presented another copy of the P&RP plan document to him. J.A. 141-42. Even if we were to determine, contrary to any commonsense reading of the record, that the request for P&RP documents *was* in writing, we would nonetheless find that the district court did not abuse its discretion in declining to impose a statutory penalty based on the facts of this case. The district court's judgment with respect to both the VSP and P&RP documents is affirmed.

Appendix A

III.

We are similarly unpersuaded by appellants' claim that the district court abused its discretion by ruling on DuPont's motion for summary judgment without providing an opportunity for additional discovery. Appellants argue that the district court erred in converting DuPont's Rule 12(b)(6) motion to dismiss into a motion for summary judgment without providing appellants notice of the conversion and a reasonable opportunity to conduct discovery.

While "reasonable opportunity" requires notice that the court is "treating the 12(b)(6) motion as a motion for summary judgment, with the consequent right in the opposing party to file counter affidavits or pursue reasonable discovery," *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985), it does not require formal notification by the court. And, in this case, appellants had ample notice that DuPont's motion was a motion for summary judgment. First, the motion caption was "Defendant's Motion to Dismiss [pursuant to 12(b)(1) and/or 12(b)(6)] *or in the Alternative* for Summary Judgment." J.A. 21-A (emphasis added). Additionally, attached to the motion were an affidavit and 110 pages of exhibits, J.A. 22-132, and DuPont filed additional affidavits with exhibits two months later. J.A. 140-290. Moreover, appellants' response to DuPont's motion was captioned "Plaintiffs' Response and Memorandum in Opposition to Defendants' Motion to Dismiss, *or In the Alternative for Summary Judgment*," and referenced DuPont's affidavit and the exhibits attached thereto. J.A. 135 (emphasis added). Finally, appellants also attached an affidavit to *their* response. J.A. 137-9.

Appendix A

This case, in which appellants were represented by a licensed attorney, is directly controlled by *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253 (4th Cir. 1998), where, on facts which exactly mirror the notice extant in this case, the court found both that "notice was ample," and that Fed. R. Civ. P. 12(b) does not impose on the court "an obligation to notify parties of the obvious." *Id.* at 261.

Despite having ample notice that the motion was one for summary judgment and almost three months between receipt of DuPont's motion and the court's grant of summary judgment to DuPont, appellants failed to submit an affidavit under Fed. R. Civ. P. 56(f) explaining why an opposing affidavit could not be filed without additional discovery. Appellants' procedural default in failing to file such an affidavit is dispositive of their claim that they had inadequate opportunity for discovery:

> [A]n appellate court will not overturn a district court's grant of summary judgment on bald assertions of inadequate discovery when the party did not make an appropriate motion under Rule 56(f).

Laughlin, 149 F.3d at 261. For the above reasons, and especially in light of appellants' inability to articulate — even at this late date — the specific discovery it would seek given the opportunity, we decline to find that the district court's consideration of the motion for summary judgment without formal notice or additional time for discovery constitutes an abuse of discretion.

Appendix A

CONCLUSION

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA DATED AND FILED NOVEMBER 29, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:99-CV-48-F(1)

J. B. PINER, et al.,

Plaintiffs,

v.

E. I. DuPont DE NEMOURS
AND COMPANY, et al.,

Defendants.

This matter is before the court upon the motion of the defendants (hereinafter collectively "DuPont") to dismiss or in the alternative for summary judgment. The court has considered the various affidavits appended to DuPont's memoranda, and therefore, treats this motion as one for summary judgment. Rules 12(b) & 56, Fed R. Civ. P. Plaintiffs have responded to the motion, and the matter is now ripe for disposition.

This action is brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, by eleven employees or former employees of DuPont

at its Cape Fear facility in Leland, North Carolina, "on behalf of themselves and all others similarly situated." They seek various forms of relief in connection with the DuPont VSP Prime ERISA severance plan. The undisputed facts appear to be as follows.

In 1991 and 1992, DuPont instituted early retirement incentives at the Cape Fear facility. These plans, known as Voluntary Separation Plans ("VSP"), offered certain enhanced benefits under DuPont's tax-qualified pension plan as an incentive for employees to elect early retirement. Plaintiffs are not participants in the VSP Prime plan. The gravamen of plaintiffs' complaint is that select upper management employees were granted enhanced pensions through the VSP Prime plan, which plaintiffs contend was funded in part by the DuPont Pension and Retirement Plan (P&RP) trust in which they do participate. Plaintiffs contend such use of P&RP funds constituted a breach of DuPont's fiduciary duties under ERISA. The VSP Prime summary plan description explicitly provides that "the payment under this program is payable from the company's general assets, not from the P&RP pension trust fund." In addition, DuPont Benefits Manager Ann Cole avers:

> VSP Prime benefits were paid from DuPont's general corporate assets or operating funds. There was no enhancement for VSP Prime participants to any benefit paid from the DuPont Pension and Retirement Plan (P&RP) trust. VSP Prime participants remained eligible for the same

> benefits under the P&RP that they were eligible for without regard to VSP Prime, no more and no less.

Second Affidavit of Anne M. Cole, October 28, 1999, Exhibit to DuPont's Reply.

As VSP Prime was, by its terms and in fact, a separate benefit paid from general corporate assets, there is no factual predicate to support the plaintiffs' substantive ERISA claim.

Plaintiffs also have asserted a claim under 29 U.S.C. § 1132(c), for the recovery of statutory penalties by reason of DuPont's failure to share plan documents and information with them. However, such claims must be dismissed upon motion of DuPont because:

(1) Plaintiffs are not participants in the VSP Prime plan and therefore have no right to the VSP Prime plan documents they allegedly requested. Accordingly, plaintiffs lack a standing to assert penalty claims as to those documents.

(2) Plaintiff Piner's written request for plan information did not seek a copy of the P&RP plan; rather, it requested the approved plan for the *VSP*.

(3) Plaintiff Piner made a specific oral request for a copy of the P&RP plan, and a copy of the same was almost immediately sent to him by internal plant mail on February 12, 1997. When Piner did not receive that copy, he promptly was provided with another copy when the issue was brought to DuPont's attention a second time. These circumstances do not warrant the imposition of a penalty by this court.

Finally, the plaintiffs have failed to carry their burden in opposing summary judgment, because they have failed to demonstrate the existence of a question of material fact. Rule 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule [by affidavits, depositions, answers to interrogatories, or further affidavits], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 56(e), Fed. R. Civ. P. Therefore, a district court must enter judgment against a party who, "after adequate time for discovery . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.*, 152 F.3d 313, 315 (4th Cir. 1998). Where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law," entry of summary judgment is mandated. Fed. R. Civ. P. 56(c); *Stone v. Liberty Mutual Ins. Co.*, 105 F.3d 188, 190 (4th Cir. 1997). To avoid summary judgment on a defendant's motion, a plaintiff must produce evidence creating a genuine issue of

material fact. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The only evidentiary proffer the plaintiffs have produced in opposition to instant motion is the October 12, 1999, Affidavit of Jimmy B. Piner, in which he details his efforts to obtain the VSP Prime plan description. As noted above, however, he is not entitled to that information, as he is not a VSP plan participant. Plaintiffs have offered no other competent evidence to support their position in defense of the instant motion.

For the foregoing reasons, as more fully developed in DuPont's Memoranda filed in support thereof, its Motion for Summary Judgment is ALLOWED.

SO ORDERED.

This the 24th day of November, 1999.

s/ James C. Fox
JAMES C. FOX
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

NO. 7:99-CV-48-F1

J.B. PINER, JUDY BROWN, STEPHEN C. BYRD, WILLIAM CLEMMONS, THOMAS E. GRADY, NORMAN HORNE, STEVENS McLEAN, JEFFERY L. STEALER, C.D. STOKES, JAMES H. WEBB, and LARRY WHITLEY, on behalf of them selves and all others similarly situated,

Plaintiffs,

v.

E.I. DuPONT de NEMOURS and COMPANY, THE BOARD OF BENEFITS AND PENSIONS OF E.I. DuPONT de NEMOURS AND COMPANY, and THE DuPONT PENSION and RETIREMENT PLAN,

Defendants.

JUDGMENT IN A CIVIL CASE

* * *

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Appendix B

IT IS ORDERED AND ADJUDGED that for the reasons, as more fully developed in DuPont's Memoranda filed in support thereof, its Motion for Summary Judgment is ALLOWED.

THE ABOVE JUDGMENT WAS ENTERED TODAY, November 29, 1999 AND A COPY MAILED TO:

Fred T. Hamlet, Esq.
P.O. Box 29246
Greensboro, NC 27429

Richard F. Kane, Esq.
3700 Bank of America Plaza
101 South Tryon Street
Charlotte, NC 28280

November 29, 1999
Date

DAVID W. DANIEL, Clerk
Eastern District of
North Carolina

Wilmington, North Carolina

s/ [illegible]
(By) Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 12, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1082
CA-99-48-7-F

J. B. PINER; JUDY BROWN; STEPHEN C. BYRD; WILLIAM CLEMMONS; THOMAS E. GRADY; NORMAN HORNE; STEVENS MCLEAN; JEFFREY L. STEALER; C. D. STOKES; JAMES H. WEBB; LARRY WHITLEY, on behalf of themselves and all others similarly situated

Plaintiffs – Appellants

v.

E. I. DUPONT DE NEMOURS & COMPANY; THE BOARD OF BENEFITS AND PENSIONS OF E. I. DUPONT DE NEMOURS; DUPONT PENSION AND RETIREMENT PLAN

Defendants – Appellees

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

Appendix C

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK